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No. 07-1309

In The

Supreme Court of the United States

OCTOBER TERM 2008

—♦—

EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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Question Presented

Must an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, have some ascertainable structure beyond that inherent in the commission of predicate crimes – *i.e.*, patterns of racketeering activity, 18 U.S.C. § 1961(5) – by its members and associates?

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Opinion Below

The Second Circuit's unreported opinion, *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007), appears in the appendix to our *certiorari* petition.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1), having granted Edmund Boyle's timely *certiorari* petition Oct. 1, 2008.

Statutory Provisions

Primarily at issue in this case are 18 U.S.C. §§ 1961(4) and 1962(c). Section 1962(c) makes it

> unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

In turn, § 1961(4) defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, as relevant here, "any union or group of individuals associated in fact although not a legal entity."

Overview: Drawing the Battle Lines

RICO is a statute of undeniable "breadth," *Russello v. United States*, 464 U.S. 16, 21 (1983), sweeping far beyond the realm of traditional "organized crime." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492

U.S. 229, 243-49 (1989). That much is "familiar history." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985) (footnote omitted).

Broad, however, does not mean "boundless." *Ryan v. Clemente*, 901 F.2d 177, 180 (1st Cir. 1990) (Breyer, J.). And this Court has recognized that the concept of an "enterprise," the very "essence" of the statutory scheme,[1] serves as a "critical limitation" on RICO's potentially infinite scope. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993).

Edmund Boyle does not ask this Court to rewrite or even restrict the statute. *Cf. Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008). He seeks only a reaffirmation – modest but important – of the enterprise element's primacy and centrality. *See, e.g., United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (the "central role" of RICO's enterprise concept "cannot be overstated"); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (enterprise element closes "floodgates" to torrent of "common law fraud claim[s]" dressed up as RICO violations) (footnote omitted), *aff'd in part and rev'd in part on other grounds*, 710 F.2d 1361 (8th Cir. 1983) (*en banc*).

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[1] Lynch, "RICO: The Crime of Being a Criminal, Parts III & IV," 87 Colum. L. Rev. 920, 942-43, 954 & n.149 (1987) ("Second Lynch Article").

Specifically, Boyle asks the Court to make explicit what it unmistakably implied almost 30 years ago in *United States v. Turkette*, 452 U.S. 576 (1981): that an association-in-fact enterprise must have some sort of structure beyond that attending the pattern of racketeering activity – the series of predicate crimes – in which its participants engage. *See, e.g.,* Tenth Cir. Pattern Jury Inst. ("PJI") 2.74.3, Cmt. ("CA10 Cmt.") (*Turkette* "suggest[s] that the enterprise must have an organization with a structure ... separate from the predicate acts themselves"); Second Lynch Article at 974 (*Turkette* "largely endorses" ascertainable structure requirement); *Chang v. Chen*, 80 F.3d 1293, 1298-99 (9th Cir. 1996) ("*Turkette* does not specify how much structure an [enterprise] must have"), *overruled by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (*en banc*).

In resolving that RICO reaches criminal enterprises as well as legitimate ones, *Turkette* delineated the nature and properties of associations-in-fact, taking care to distinguish them from the statute's separate pattern component. In the passage vital to this case, the Court declared:

> [T]o secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an **entity**, for present purposes a group of persons associated together for a common purpose

> of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an **ongoing organization**, formal or informal, and by evidence that the various associates function as a **continuing unit**. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, **proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government.**

452 U.S. at 583 (footnote omitted) (emphasis supplied).

One "problem" raised by *Turkette* concerns "the extent to which the defendant's association with others arising from the joint commission of ... predicate acts can be construed as an association-in-fact enterprise." CA10 Cmt.; *cf.* Blakey, "The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*," 58 N.D. L. Rev. 237, 326 (1982) ("Blakey") ("little difficulty exists in discerning and establishing the elements of

'enterprise' and 'pattern'" where "legitimate entities are involved").

To ensure the obligatory separation, most circuit courts correctly read *Turkette* to require that an association-in-fact have some perceptible operating structure aside – though permissibly inferable – from that inherent in the predicate acts themselves. *See, e.g., United States v. Riccobene*, 709 F.2d 214, 222-24 (3d Cir. 1983) (hierarchical or consensual decision-making structure beyond that necessary to commit each racketeering act); *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) ("continuity of structure and personality"); *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461-62 (5th Cir. 1991) (hierarchical or consensual decision-making structure; continuity of structure and personnel) (citations and quotations omitted); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) ("ongoing structure of persons associated through time, joined in purpose, and organized in [ ] manner amenable to hierarchical or consensual decision-making") (citations and internal quotes omitted); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) ("The hallmark of an enterprise is structure.") (citation and internal quotes omitted); *United States v. Kragness*, 830 F.2d 842, 855-56 (8th Cir. 1987) (ascertainable structure distinct from that inherent in pattern of racketeering; organizational pattern or system of authority providing continuing directional mechanism) (citations omitted); *United States v. Smith*, 413 F.3d 1253, 1266-67 (10th Cir. 2005) (ongoing organization with decisional framework and

control mechanism apart from pattern); *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999) ("some structure" necessary to distinguish enterprise from "mere conspiracy") (citation and internal quotes omitted); *but see United States v. Perholtz*, 842 F.2d 343, 363-64 (D.C. Cir. 1988) (*per curiam*) (structure need not be "particular or formal") (citation omitted).

Sophistication and "access to resources" distinguish coordinated criminality from ordinary "individual and group crime." *Chang*, 80 F.3d at 1298-99 (citations and internal quotes omitted). From that premise, these courts sensibly reason that an enterprise must be something more than just a "group of people who get together to commit a pattern of racketeering." *United States v. Torres*, 191 F.3d 799, 806 (7th Cir. 1999); *see, e.g., United States v. McDade*, 28 F.3d 283, 295 (3d Cir. 1994) (Alito, J.) (RICO enterprise "must be something more than simply the pattern of racketeering activity through which the racketeers conduct[] or participate[] in its affairs") (citations and footnote omitted). As one bloc of judges, echoing *Turkette*, aptly put it, "RICO targets a more sophisticated crowd": ongoing organizations with "some minimal structure, coordination, or ordering principle[.]" *Odom*, 486 F.3d 541, 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., *concurring in result*).

For these courts, some degree of structure – however proved, by the pattern or otherwise – supplies the necessary distinguishing feature at negligible cost

to the plaintiff or prosecutor. *See, e.g., Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992) (Posner, J.) ("some" structure, but not "much," required to distinguish an enterprise). As Judge Bork and a D.C. Circuit panel said in an unsigned opinion: "The same group of individuals who repeatedly commit predicate offenses do not necessarily constitute an enterprise. An extra ingredient is required: organization." *Perholtz*, 842 F.2d at 364; *cf. Rogers*, 89 F.3d at 1337 ("an 'enterprise' is something more structured, more organized than a band of criminals").

Other circuits – a distinct minority – take a different approach, removing even that "very low hurdle" from the government's burden. *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994); *see* O'Neill, "Functions of the RICO Enterprise Concept," 64 N.D. L. Rev. 646, 713 (1989) ("O'Neill") ("not difficult" to establish valid enterprise). Confusing the **elements** of an offense with the **evidence** used to prove them, they have seized on this Court's observation that pattern and enterprise proof "may in particular cases coalesce," 453 U.S. at 583, to hold that an association-in-fact need not have *any* identifiable structure. *See, e.g., United States v. Nascimento*, 491 F.3d 25, 33-34 (1st Cir. 2007) (jury so charged and "instruction has been approved as good law in this circuit") (citation omitted); *United States v. Mazzei*, 700 F.2d 85, 87-89 (2d Cir. 1983) (rejecting ascertainable structure requirement); *Odom*, 486 F.3d at 551-52 (no "requirement that the enterprise have an 'ascertainable structure'"); *United States v. Goldin Inds., Inc.*, 219

F.3d 1271, 1274-75 (11th Cir. 2000) (enterprise "need not possess an ascertainable structure distinct from the associations necessary to conduct the pattern") (citation omitted).

And at least one circuit – the Second, Boyle's home circuit – has decisively dropped the other shoe, incrementally extending that faulty premise to its inevitable conclusion: a virtual *per se* rule that RICO applies "where the enterprise [i]s, in effect, no more than the sum of the predicate racketeering acts." *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983) (collecting cases); *accord United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985) ("RICO charges may be proven even when the enterprise and predicate acts are functionally equivalent") (citations and internal quotes omitted).[2]

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[2] The Second Circuit has not always spoken with one voice on this issue. *Cf., e.g., United States v. Mejia*, Nos. 05-2586-cr *et seq.*, 545 F.3d 179, 2008 WL 4459289, at *20 (2d Cir. Oct. 6, 2008) (noting that charged enterprise, a nationwide street gang, had "leadership structure" separate from "series of predicate acts"); *City of New York v. Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 451 (2d Cir. 2008) (affirming partial dismissal of civil RICO complaint for failure to adequately allege "continuity of structure and personnel" or "consensual decision-making structure") (internal quotation marks omitted). Still, *Bagaric* and *Ferguson* survive, continuing to generate cursory unpublished opinions like the one in this case. *See, e.g., Pavlov v. Bank of New York Co., Inc.*, No. 01-7434, 25 Fed. Appx. 70, *71-*72, 2002 WL 63576, at **1-**2 (2d Cir. Jan. 14, 2002) ("We have repeatedly found a sufficient enterprise where the complaint alleges a group without [structural]

(continued...)

The minority view fundamentally misconstrues *Turkette*. **First**, as the Second Circuit's position demonstrates, eliminating any structure requirement effectively "equate[s]" enterprise with pattern, *United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982), collapsing "two statutory elements" into one, *Korando*, 29 F.3d at 1117 (citation and internal quotes omitted). In turn, that renders the enterprise wholly "superfluous," *Chang*, 80 F.3d at 1298, defying *Turkette*'s clear mandate – "[t]he existence of an enterprise at all times remains a separate element which must be proved"[3] – and relieving the government's burden of establishing every essential offense element beyond a reasonable doubt. *See, e.g., United States v. Booker*, 543 U.S. 220, 230 (2005).

The minority view thus reduces the enterprise to "just a[nother] name for the crimes the defendants commit[ ]"[4] – a bare "summation of predicate acts," *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989) – effectively reading it out of the statute. As one commentator cogently notes:

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[2](...continued)
hierarchy") (collecting cases); *cf. United States v. Eppolito*, 543 F.3d 25 (2d Cir. 2008) (apparently unstructured enterprise composed of two corrupt police officers).

[3] 452 U.S. at 583 (footnote omitted).

[4] *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.).

> This is not simply a matter of overlapping proof of two distinct elements of the crime. Rather, it is a construction whereby one element is completely swallowed by another. Such a result is unacceptable.

Kiffel, "Reading the 'Enterprise' Element Back Into RICO: Sections 1962 and 1964(c)," 76 Nw. U. L. Rev. 100, 110-11 n.64 (1981) ("Kiffel").

Second, since organization and common purpose are attributes of all joint criminal activity,[5] renouncing structure makes every long-term conspiracy an "*ipso facto*" enterprise, *Odom*, 486 F.3d at 555 (opinion concurring in result), reducing RICO to an "aggravated conspiracy statute"[6] with a drastically enhanced penalty. *See H.J.*, 429 U.S. at 233, 243 n.4 (describing RICO's "severe" penalty provisions). As the Eighth Circuit explains:

> [A]n enterprise cannot simply be the undertaking of the acts of racketeering ... [or] the minimal association ... surround[ing] the[m].... Any two criminal

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[5] *See United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) ("Any two wrongdoers who through concerted action commit two or more crimes share a purpose.").

[6] Second Lynch Article at 923 (footnote omitted).

> acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself. Thus unless ... the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to [it], the Act simply punishes the commission of two of the specified crimes [in a pattern].

Bledsoe, 674 F.2d at 664; *see also id.* at 659 (RICO not a "catchall reaching all concerted action of two or more criminals involving two or more" predicate crimes).

Thus, contrary to the minority approach, the terms "enterprise" and "conspiracy" are "not synonymous," *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir. 1986), and a run-of-the-mill conspiracy does not and cannot rise to a cognizable RICO enterprise, *see Chang*, 80 F.3d at 1300 (citation omitted). Indeed, absent some special "threat" of "harm," long-term group crime would not justify a statute going "beyond conventional conspiracy doctrine," which already examines "an extended course of conduct by one or more individuals." Second Lynch Article at 933, 974. Structure – an enterprise's

"hallmark"[7] and "central element"[8] – provides both the threat and the justification, distinguishing RICO from conspiracy *simpliciter* and rationalizing its harsh "additional"[9] sanctions. *Compare* 18 U.S.C. § 371 (five-year penalty for general conspiracy) *with* 18 U.S.C. § 1963(a) (20-year penalty for RICO offense).

Without structure, conversely, "'enterprise' collapses to 'conspiracy,'" *Limestone Dev. Corp. v. Village of Lemont, Il.*, 520 F.3d 797, 805 (7th Cir. 2008) (Posner, J.), making every agreement to commit predicate crimes an enterprise and every conspirator a racketeer. "That is not the law." *Bachman v. Bear, Stearns & Co., Inc.*, 178 F.3d 930, 932 (7th Cir. 1999) (Posner, C.J.); *cf. Salinas v. United States*, 522 U.S. 52, 65 (1997) (juxtaposing operation of § 1962(c) "enterprise" with § 1962(d) "conspiracy" while recognizing that the "two crimes" may factually coincide). For it would invite the addition of RICO counts to every § 371 indictment, authorizing extra convictions and automatic sentence boosts for the very same conduct – an idea analogously rejected by a plurality of this Court just last Term. *Cf. United States v. Santos*, 128 S. Ct. 2020, 2026-27 (2008).

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[7] *Johnson*, 440 F.3d at 840 (citation and internal quotes omitted).

[8] *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006) (citation and internal quotes omitted).

[9] *Riccobene*, 709 F.2d at 221.

In sum, it is one thing to acknowledge that RICO, while primarily "target[ing] organized crime," *Anza v. Ideal Supply Corp.*, 547 U.S. 451, 463 (2006) (Thomas, J., *concurring and dissenting*), is not so limited. *Cf. id.* at 479 (Breyer, J., *concurring and dissenting*) ("central purpose[]" is "prevent[ing] organized criminals from taking over or operating legitimate businesses"). But it is "worlds apart"[10] to suggest that an enterprise requires no structure at all, doing away with the notion entirely. That goes too far to the opposite extreme, turning the statutory rationale on its head and relegating the core enterprise concept to a legal fiction.

After all, RICO essentially makes it a crime to "function as a member of an organized criminal group," Alito, "Racketeering Made Simple(r)" at 4, in *The RICO Racket* (McDowell ed. 1989) ("Alito Article"), capturing other offenders only incidentally, so as to reach organized crime in all its diversity. As the Act's main sponsor conceded:

> Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial

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[10] *Santos*, 128 S. Ct. at 2030 (plurality opinion).

> activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

116 Cong. Rec. 18,940 (1970) (Sen. McClellan); *see also, e.g., id.* at 18,913-14 (Sen. McClellan) (key provisions confined to organized crime "to the maximum degree possible").

An identifiable structure requirement – contemplating some ongoing directional apparatus, though not the reticulation of, say, a corporation or Mafia family – resolves that tension and fulfills the statutory purpose "in a formulation that is easy to apply." *Reves*, 507 U.S. at 179.[11] It enforces Congress's will without cramping RICO's breadth, compromising its integrity or hobbling its effectiveness. It is faithful

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[11] As noted, seven circuits already employ some kind of structure test, and several incorporate variants in their pattern jury instructions, "without creating discernible mischief" in RICO's "administration." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001) (citations omitted). *See* Seventh Cir. PJI 18 U.S.C. § 1961(4); Eighth Cir. PJI 6.18.1962D; *cf.* Fifth Cir. PJI 2.78; Tenth Cir. PJI 2.76.2. Given its widespread use and lengthy pedigree, there can be no claim that a structure test – unlike, say, a "scheme," "racketeering injury" or "organized crime" requirement – is vague, unworkable or hard to explain to a jury. *Cf. H.J.*, 492 U.S. at 241 n.3, 248; *Sedima*, 473 U.S. at 493-500. To the contrary, the test is "simple and vivid," as crooks "allied for the limited purpose of engaging in several [criminal] episodes ... will [rarely] create any more structure than absolutely necessary to pull [them] off." Gardiner, "The Enterprise Requirement: Getting to the Heart of Civil RICO," 1988 Wis. L. Rev. 663, 683-84 (1988).

to legislative history and compelled by the statutory language, context and framework as construed in this Court's precedents. And it reflects the realities on the ground, mirroring prevailing law and practice in everyday RICO cases.

For all these reasons, amplified below, some requirement of structure should be – and inescapably is – an "essential part" of the enterprise "definition." Second Lynch Article at 974-75; *see* CA10 Cmt. (most circuits focus on "structure and organization" as enterprise's "critical defining element").

Statement of the Case

This case illustrates the "enigmatic" nature of the association-in-fact concept, *cf. H.J.*, 492 U.S. at 251 (Scalia, J., joined by Kennedy and O'Connor, JJ., and Rehnquist, C.J., *concurring in the judgment*), showing how far it has been stretched beyond permissible bounds.

A grand jury indicted Boyle and eight codefendants on, *inter alia*, RICO and RICO conspiracy charges, alleging that he participated in a 10-year run of interstate bank burglaries – and a single bank robbery on which the *petit* jury hung – as part of a putative association-in-fact enterprise called the "Night Drop Crew." (Govt. COA App. 1-33.) From the start, the defendants attacked the enterprise as a fantasy. Most pointedly, they argued in pretrial motions that the government had ascribed some of the same crimes

to other purported enterprises with allegedly overlapping members – for example, the "Bank Crew" and the "New Springville Boys" – in earlier prosecutions. (Def. COA App. 63-240.) Accordingly, the defendants maintained, the government was inventing enterprises to suit its prosecutorial needs, imputing the same offenses to different "artificial" constructs on a case-by-case basis. Second Lynch Article at 954 n.149 (enterprise element "sufficiently artificial that a defendant would [often] be surprised to learn ... he was part of one").

After the motions were filed and most of the defendants had pled guilty – leaving Boyle as the principal remaining defendant and the only one eventually to stand trial – the government superseded the indictment to name yet another enterprise. This time it swapped the "Night Drop Crew" moniker for the more expedient "Boyle Crew," Govt. COA App. 34-63; Def. COA App. 48-62. *Cf. United States v. Vastola*, 899 F.2d 211, 232 (3d Cir. 1990) (cautioning against alleging eponymous enterprise).

Boyle continued to challenge the enterprise's existence at trial, exposing it – through cross-examination of the government's own accomplice witnesses – as a shapeless and sprawling "clique" of "friends" who periodically burgled night deposit boxes in shifting combinations. JA 68, 75 (prosecution witness Gerard Bellafiore characterizing "Crew" as an iteration of "all of the people named in the indictment basically"). Indeed, the accomplice witnesses

themselves described the supposed "Boyle Crew" as a loose band of "free floaters" without a unifying "plan" or "understanding" – ongoing, "formal," "informal" or otherwise. *See, e.g.,* JA 45-47 (Christopher Ludwigsen a.k.a. Paciello ("Paciello")); JA 86 (Blas Salvatore "Fat Sal" Mangiavillano); JA 79 (Bellafiore). Rather, "different people" would commit crimes at "different times" and "places" – on an "individual," *ad hoc* and impromptu basis – with no set "crew" or "group" backing. *See, e.g.,* JA 45-47 (Paciello); JA 83 (Bellafiore: no group "requirements"); JA 94 (Mangiavillano "[n]ever heard" of Boyle Crew).

More specifically, the cooperators variously admitted that:

- "Nobody had any type of standing where he was the boss...." JA 45 (Paciello).

- "[T]here was **no organization at all**." JA 45 (Paciello) (emphasis supplied); *accord* JA 79 (Bellafiore) (similar).

- "**Each individual crime withstood by itself**." JA 45 (Paciello) (emphasis supplied).

- There was **no** "ongoing informal plan" among a "group of people to commit crimes so ... the group could profit." JA 46 (Paciello).

- Individual conspirators "did crimes together" but **not** "as a group." *Id.* (emphasis supplied).

- "[T]here was **no** leadership" or "informal understanding among the group." JA 47 (Paciello) (emphasis supplied); *accord* JA 79 (Bellafiore) (no "leader[s]" or "formal understanding").

- "[I]t was just who was available to do the job when it came up." JA 47 (Paciello); *accord* JA 76-77 (Bellafiore) (similar); T: 1329 (govt. rebuttal summation) ("These people ... commit ... bank crimes ... with a lot of different people, ... who[ever is] available").

At the close of the evidence, Boyle requested the following jury instruction on RICO's enterprise element:

> To establish an association-in-fact enterprise, the government must convince you, beyond a reasonable doubt, that the alleged Boyle Crew had an ongoing organization, a core membership that functioned as a continuing unit, and **an ascertainable structural hierarchy distinct from the charged predicate acts**. If the government fails to meet this

> burden, you must acquit Mr. Boyle on the RICO counts.

JA 95 (citations and footnote omitted) (emphasis supplied). *Cf., e.g.,* Eighth Cir. PJI 6.18.1962D (government must prove a "structure distinct from that necessary to conduct the pattern"); Seventh Cir. PJI 18 U.S.C. § 1961(4) ("some form or structure beyond the minimum necessary to conduct the [] pattern"); *Korando*, 29 F.3d at 1118 (jury "properly instructed" that enterprise must have structure "separate from the commission of the predicate acts").

The District Court denied the request, telling the jury, over objection, JA 97-109, just the opposite: "you **may** find an enterprise where an association of individuals, **without structural hierarchy**, forms solely for the purpose of carrying out a pattern of racketeering acts." JA 112 (emphasis supplied); *see also* JA 111-12 ("Common sense suggests that the existence of an association is oftentimes more readily proven by what it does, **rather than by abstract analysis of its structure**.") (emphasis supplied); JA 112 ("it is **not** necessary that the enterprise have **any particular or formal structure**") (emphasis supplied).

The jury convicted Boyle on 11 counts, including both racketeering charges and a five-year bank burglary conspiracy count, 18 U.S.C. § 371, subsuming all the proven predicate acts. (Def. SPA 1-8.) The District Court imposed a 151-month sentence (12½ years). (*Id.)*

Boyle continued to press the enterprise point on appeal, arguing that the government violated due process by attributing the same crimes to different enterprises in successive prosecutions. (Def. COA Br. 12-19.) He also contested the enterprise instruction and evidence, claiming it failed to prove a structured entity distinct from the predicate bank burglaries – the issues now before this Court. (*Id.* 19-38, 49.)[12] The Second Circuit summarily rejected those challenges, presumably relying on *Bagaric* and *Ferguson,* but remanded for resentencing on unrelated grounds. Cert. Pet. App. 3-4.

On remand, the District Court cut Boyle's sentence by 33 months. Boyle is serving his sentence while facing separate capital charges under, *inter alia*, 18 U.S.C. § 1959, the Violent Crimes in Aid of Racketeering Act (VICAR). *United States v. Boyle, et al.,* 08 CR 523 (S.D.N.Y.) (CM). Given those charges and Boyle's nine intact bank burglary convictions – including the global § 371 conspiracy – there is little risk of a windfall should he prevail in this Court.

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[12] Alternatively, Boyle asserted that the evidence showed only multiple enterprises rather than the unitary one alleged in the indictment. (Def. COA Br. 38-49.)

Summary of the Argument

I. In language and logic, *Turkette*'s description of an associative "enterprise" – a separate "*entity*" with "ongoing *organization*" and a "*continuing* unit" of associates – implicitly assumes some degree of structure. A structure requirement also complements and inheres in this Court's interpretation of RICO's other main ingredients: "conduct," necessitating an organic entity to operate and manage (*Reves*), and "pattern," allowing an inference of continuity from a true criminal enterprise (*H.J.*).

II. A structure requirement is apparent in (A) the titles of RICO and the Organized Crime Control Act (OCCA)[13]; (B) § 1962(c)'s text interpreted under the anti-nullification canon; (C) § 1961(4)'s plain terms read in context; (D) the ancillary VICAR statute's "maintain or increase" enterprise "position" element; (E) the government's own concession that VICAR requires an ascertainably structured enterprise apart from its racketeering activity; and (F) RICO's and OCCA's meticulous distinction between enterprise and conspiracy.

III. A structure requirement accords with RICO's legislative history, focusing on organized crime and its

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[13] Pub. L. 91-452, 84 Stat. 922 (1970), incorporating RICO as Title IX.

infiltration of business, labor unions and government – all structured entities.

IV. A structure requirement matches the realities of daily RICO practice and will not impair the statute's enforcement, as the government customarily proves enterprise structure as a pillar of its RICO litigation strategy.

V. Lenity requires a structured enterprise to avoid grave Fifth and Sixth Amendment problems – involving vagueness, lack of fair notice and relieving an essential element of the government's burden of proof – attending the contrary view.

VI. Boyle's conviction must be reversed for legal insufficiency and instructional error, or the case remanded for application of the ascertainable structure test in the first instance.

ARGUMENT

AN ASSOCIATION-IN-FACT ENTERPRISE MUST HAVE SOME PERCEPTIBLE STRUCTURE TRANSCENDING ITS PREDICATE CRIMES

I. AN ASCERTAINABLE STRUCTURE REQUIREMENT IS IMPLICIT IN, AND COMPELLED BY, RICO'S PLAIN TEXT AND MEANING AS EXPLICATED IN THIS COURT'S CASES

A. *TURKETTE*'S PLAIN LANGUAGE DEMONSTRABLY CONTEMPLATES A SHOWING OF STRUCTURE

In interpreting a statute, this Court looks "first to its language." *Turkette*, 452 U.S. at 580. At issue is the undefined phrase "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This provision has been aptly termed "nebulous," Kiffel at 104, and "amorphous," Second Lynch Article at 973. *Accord, e.g.*, Vitter, "The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View," 62 Tul. L. Rev. 1419, 1448 (1988) ("Vitter") ("statutory definition" is "very concise and of little help in the case of illegitimate

enterprises. And no legislative history regarding illegitimate enterprises exists.").

But this Court does not write on a blank slate in construing the clause. Rather, *Turkette* outlined the contours of an association-in-fact enterprise, referring to it twice as an "entity." 452 U.S. at 583. The entity also must be separate from the pattern of activity in which it engages – again repeated twice – with an "ongoing organization" and a "continuing unit" of associates. *Id.*

Indeed, the government itself proposed a similar definition in *Turkette*, casting the enterprise as an "independent **entity**" whose existence must be "shown." *Id.* at n.5 (citation and internal quotes omitted) (emphasis supplied). And this Court has routinely returned to the "entity" label in subsequent cases. *See Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 260-61 (1994) ("*Scheidler I*") ("'enterprise'" includes wholly criminal "**entities**") (emphasis supplied); *H.J.*, 492 U.S. at 242 (predicate acts may be "part of an ongoing **entity**'s regular way of doing business") (emphasis supplied); *Kushner*, 533 U.S. at 160-61 (enterprise is a distinct entity, not simply the RICO "person" by a different name). *See also, e.g.,* Blakey & Gettings, "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies," 53 Temp. L.Q. 1009, 1023 n.81, 1025-29 n.91 (1980) ("Blakey & Gettings") (repeatedly describing enterprise as a "separate entity").

An "entity" suggests something concrete, real and tangible – something that has an "objective or physical reality and distinctness of being and character." Webster's Third New International Dictionary 758 (2002) ("Webster"). It "exists as a particular and discrete unit" considered "apart from its properties,"[14] a definition that closely tracks *Turkette*'s "separate and apart from [its] pattern" formulation. Put another way, an "entity" is a "self-contained" being with a "unitary" character and an "independent or separate existence," as "contrasted with its attributes or properties." Webster at 758.

The attributes and properties of an association-in-fact are, manifestly, its participants and the acts they commit. Thus, to constitute an enterprise as conceived in *Turkette* – that is, a discrete, independent "entity" existing apart from its properties – it follows that such an association must be something more than just the sum of those acts and participants. *See, e.g.*, *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) (a "collective entity is something more than the members of which it is comprised"). It must be more than a mere combination of its constituents and predicate crimes, *i.e.*, whom it comprises and what they do. *See Turkette,* 452 U.S. at 583 (enterprise is an entity "separate and apart from the pattern of activity in which it engages"); *Kushner*,

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[14] The American Heritage Dictionary of the English Language 615 (3d ed. 1996) ("American Heritage").

533 U.S. at 161 (enterprise is an entity distinct from RICO person); *Reves*, 507 U.S. at 185 (defendants must conduct "the enterprise's affairs, not just their own") (internal quotes omitted); *cf. H.J.*, 492 U.S. at 237 (statute assumes there is "something to a RICO pattern beyond the simple number of predicate acts involved") (emphasis omitted).

That something more – the quality that makes an association an "entity" – is a cohesive structure. For it is structure that forms an "entity" from a clot of elements and component parts – here, an association's members and how they behave. *See* Webster at 2267 (defining "structure" as "the elements or parts of an entity or the position of such elements and parts in their external relationships to each other"); American Heritage at 1782 (defining "structure" as "the interrelation or arrangement of parts in a complex entity"); *accord, e.g., Burdett*, 957 F.2d at 1379 (equating "structure" with "identifiable entity").

Any linguistic doubt on this score – and there can be none – is resolved by the definition of "organization," the second key associational feature identified in *Turkette*. In plain English, "organization" means an "organic structure" or "purposive systematic arrangement," Webster at 1590, or a "structure through which individuals cooperate systematically to conduct

business." American Heritage at 1275.[15] And, concomitantly, "structure" means "something having a definite or fixed pattern of organization," or "the way in which the parts of something are put together or organized." Webster at 2267.

As these definitions indicate, the words "organization" and "structure" are virtually synonymous. *See id.* (defining verb "structure" as "to form into an organized structure"); *id.* (defining "structured" as "exhibiting organized structure"); American Heritage at 1782 (defining "structured" as "Highly organized"); *cf.* Webster at 2267 (defining "structureless" as "lacking definite structure or organization"). Thus, by equating an "enterprise" with an "ongoing organization," *Turkette* necessarily anticipates some sort of structural showing. *See, e.g.,* Lynch, "RICO: The Crime of Being a Criminal, Parts I & II," 87 Colum. L. Rev. 661, 662 n.11 (1987) ("First Lynch Article") ("'organized'" means "relatively structured"); Seventh Cir. PJI 18 U.S.C. § 1961(4) (consider whether putative enterprise has "ongoing organization or structure"). As discussed in our **Overview** (*see supra* 4), many authorities recognize as much, using "organization" and "structure" all but interchangeably. *See, e.g., Riccobene*, 709 F.2d at 12 ("'ongoing organization requirement'" refers to group's "superstructure or framework"); *Perholtz*, 842 F.2d at

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[15] We read the "business" reference as illustrative rather than exclusive.

362 ("The second element – 'organization' or 'structure' – is the most difficult to show."); *Chang*, 80 F.3d at 1300 ("Appellants have failed to allege an organization, formal or informal, with sufficient structure to satisfy RICO's enterprise element.").

In sum, an ascertainable structure requirement is implicit in the prime enterprise traits enumerated in *Turkette*: those of a separate "entity" with an "ongoing organization" and "continuing" personnel. If the government's pattern evidence suffices to establish a structured entity, formal or informal – *i.e.*, where the jury can infer some independent organization from the nature, frequency and duration of the predicate acts – then nothing more is required. On the other hand, if the pattern proof alone is not sufficient to support such an inference, then additional evidence of structure will be necessary. *See, e.g.,* Blakey & Gettings at 1027 n.91 (confirming that enterprise is "a separate entity as opposed to just [multiple] individuals acting together," and recognizing that pattern evidence may or may not suffice to infer its existence); *United States v. Pelullo*, 964 F.2d 193, 211 (3d Cir. 1992) (structural inquiry is fact question for properly instructed jury).[16] Again,

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[16] This approach parallels *H.J.*'s observation that, depending on the circumstances, proof of a defendant's participation in just two racketeering acts – or of his involvement in "multiple criminal schemes" – may or may not suffice to establish a RICO pattern. *See* 492 U.S. at 237-38, 240-41; *cf., e.g., id.* at 239 (pattern's "constituents," relatedness and continuity, are analytically distinct

(continued...)

many courts agree, finding structure fully commensurate with the *Turkette* criteria. *See, e.g., Kragness*, 830 F.2d at 855 (equating *Turkette*'s "ongoing organization" and "continuing unit" language with "continuity of structure" and personnel); *Limestone*, 520 F.3d at 805 (ongoing structure requirement echoes *Turkette*'s "continuing unit" language); *Torres*, 191 F.3d at 806 (equating continuity and structure).[17]

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[16](...continued)
though their proof may "overlap"); *Salinas*, 522 U.S. at 65-66 (juxtaposing "enterprise" with "predicate acts" while noting that defendant's commission of two such acts may help tie him to enterprise in § 1962(d) cases).

[17] Though largely mimicking the *Turkette* factors, an ascertainable structure requirement is neither redundant nor superfluous. As evidenced by the deep circuit split on this issue, *Turkette*'s "explanation of the meaning of an associated-in-fact enterprise" has not been "clearly understood in the lower courts," *Odom*, 486 F.2d at 549. A structure requirement will clarify the "[c]onfusion," *id.*, reason enough to adopt it explicitly. *See H.J.*, 492 U.S. at 235-36 (citing "plethora" of divergent judicial "views" as reason for tightening RICO pattern definition). More fundamentally, a structure requirement will dispel the "unacceptable" misconception implicit in the minority position: that enterprise is "subject to a lesser standard of proof" than pattern – one short of reasonable doubt – in illicit association cases. *Cf. United States v. Huezo*, No. 07-0031-cr, __ F.3d __, 2008 WL 4553150, at *9 (2d Cir. Oct. 14, 2008) (concurring opinion of Newman, J., joined by full panel). In sum, an express structure requirement will ensure that the enterprise "remains a separate element which must be proved," *Turkette*, 452 U.S. at 583 – not
(continued...)

B. THIS COURT'S OTHER KEY RICO CASES UNIFORMLY PRESUME THE EXISTENCE OF A STRUCTURED ENTERPRISE

Turkette's tacit premise – that an enterprise must have some type of structure – is validated by this Court's subsequent decisions in *Reves* and *H.J.* RICO is a statute with many moving parts, and they must be read in conjunction, not isolation, to work in unison. A structure requirement serves that purpose, going hand-in-glove with the Court's interpretation of § 1962(c)'s other "predominant" elements: namely, the enterprise's "conduct" through a "pattern of racketeering activity." *Salinas*, 522 U.S. at 476 (citation omitted).

1. *Reves*: Operators, Managers, Rungs and Ladders

In *Reves*, the Court pondered what it means to "conduct" or "participate ... in the conduct of [an] enterprise's affairs." *See* 18 U.S.C. § 1962(c). To do so, the Court said, a defendant must "participate in the operation or management of the enterprise itself," playing "some part" in its direction or control. 507 U.S. at 178-79, 183, 185; *cf. Burdett*, 957 F.2d at 1379

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[17](...continued)
mere window-dressing or a pseudonym for pattern – and that lower courts pay it more than just lip service.

("some" structure necessary to distinguish enterprise from pattern).[18]

Like *Turkette*, *Reves* plainly contemplates the existence of a structured enterprise, pinning its operation and management test on that very assumption.

First, *Reves* distinguishes the affairs of an enterprise from an enterprise itself, suggesting the enterprise is a separate animal that has and is capable of having affairs. *Cf.* 18 U.S.C. § 1964(a) (juxtaposing "enterprise" with "endeavor[s]"); *Kushner*, 533 U.S. at 165 (recognizing that an enterprise has "purposes").

Second, in requiring that a defendant play some part in directing the enterprise itself – as opposed to its affairs or those of its participants – *Reves* confirms that an enterprise is something different and greater than either or both of those ingredients, *i.e.*, something more than just a euphemism for its members and activities. *See Reves*, 507 U.S. at 185 (contrasting enterprise's affairs with those of defendants); *id.* at 182 n.7 (citing legislative history distinguishing commercial enterprises from their methods of operation). In other

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[18] Though *Reves* involved a legitimate enterprise, its operation and management test applies equally to associations-in-fact. *See, e.g.,* 3 L. Sand, *et al.*, *Modern Federal Jury Instructions – Criminal*, Inst. 52-25 (Matthew Bender) ("Sand") (general instruction requiring "operation or management" evidence in all § 1962(c) cases).

words, the case makes it crystal clear that an enterprise is an independent entity with its own structured existence. *Accord H.J.*, 492 U.S. at 242 (juxtaposing "entity[ ]" with "predicate acts").

Third, by their very nature, the words "operate" and "manage" – not to mention "direct" and "control" – inherently signify a degree of structure.[19] After all, the *Reves* test presupposes something *to* operate and manage, along with means and methods for doing so. *See, e.g.,* Webster at 1372 ("management": the "conducting or supervising of something"). A measure of structure – for example, a protocol for taking decisions; a chain of command for communicating them; and/or differentiated role players to carry them out – fits the bill, making the test clear and comprehensible. Without structure, on the other hand, there would be nothing to manage or operate – let alone direct or control – rendering the test incoherent.

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[19] *See, e.g.,* Webster at 1581 ("operations": the "process of planning for and operating a business or other organized unit"); *id.* at 1372 ("management": the "executive function of planning, organizing, coordinating, directing, controlling and supervising any industrial or business project or activity"); American Heritage at 1091 ("management": the "person or persons who control or direct a business or other enterprise"); Webster at 640 ("direct": "to carry out the organizing, energizing, and supervising of esp. in an authoritative capacity"); *cf. id.* at 496 ("control": "application of policies and procedures for directing, regulating, and coordinating production, administration, and other business activities").

Reves itself illustrates the point, positing both a vertical "ladder of operation" – including upper managers, "lower rung participants" and other "low-level employees" under their "direction" – and horizontal control persons running the enterprise illicitly. 507 U.S. at 184 & n.9. A clearer expectation of structure would be hard to formulate. This is especially true given *Reves*'s additional observation that liability extends beyond those with "primary [supervisory] responsibility," suggesting even further stratification. *Id.* at 179; *accord Kushner*, 533 U.S. at 165 (hypothesizing "illegitimate" enterprise composed of "high-ranking individuals" and, presumably, their subordinates).

For all these reasons, a structure requirement is implicit in *Reves* as well as *Turkette*, perfectly complementing the operation and management test. *Cf. Riccobene*, 709 F.2d at 222 (structure entails a "mechanism for controlling and directing" group affairs on ongoing rather than *ad hoc* basis).[20]

2. *H.J.*: Relation, Continuity, Circularity and Federalism

A structure requirement is also implicit in *H.J.*, where the Court held that predicate acts must be

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[20] While conceptually overlapping *Reves*, a structure requirement is neither redundant nor superfluous, as the tests address entirely different statutory elements: collective enterprise vs. personal participation. *Cf. supra* n.17.

related and continuous to form a RICO pattern. 492 U.S. at 237, 239. The continuity prong recalls *Turkette*'s "continuing unit" language, which intrinsically connotes structure. *See supra* 28-29. Accordingly, a structured enterprise also dovetails with – but does not duplicate – *H.J.*'s pattern definition.[21]

More significantly, *H.J.* went on to note that continuity may be found where the predicate acts are part of a "long-term [criminal] association," 492 U.S. at 242-43. In other words, a RICO pattern, or at least its continuity aspect, may be inferred from proof of an illicit RICO enterprise. This proposition confirms that an enterprise is something different – something more concrete and substantial – than its predicate acts alone. Were it not, there would be nothing other than the predicate acts from which to infer the pattern, reducing the proposition to a tautology: proof of a pattern may establish a pattern. That cannot be what *H.J.* meant.

The point is punctuated by reading *H.J.* and *Turkette* in tandem. Together, the cases allow juries to infer an enterprise from proof of a pattern, *Turkette*, 452 U.S. at 583, and a pattern from proof of an enterprise. *H.J.*, 492 U.S. at 242-43. Without a genuine organic entity to anchor it – that is, if an enterprise is just a proxy for its predicate acts – this equation dissolves into circular "gibberish." *Korando*,

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[21] Again, this is because pattern and enterprise are wholly separate statutory elements. *Ibid.*

29 F.3d at 1118. Structure is therefore crucial to give the enterprise content and meaning as a truly separate element. Indeed, the vagueness of the pattern concept itself, roundly criticized in *H.J.*,[22] only accents the need for a viable enterprise with a "plausible" existence and structure. *Cf. Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).[23]

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[22] *See* 452 U.S. at 236, 243, 249 (majority opinion); *id.*at 251-56 (opinion concurring in judgment); *accord Sedima*, 473 U.S. at 500; *Ft. Wayne Books v. Indiana*, 489 U.S. 46, 76-77 n.14 (1989) (Stevens, J., joined by Brennan and Marshall, JJ., *concurring and dissenting*) (noting that pattern requirement has been likened to Justice Stewart's famous obscenity test in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion): "I know it when I see it.") (additional citations and quotation marks omitted).

[23] Relatedly, an enduring structural apparatus works together with the pattern's continuity component to promote RICO's overriding goal of deterring "long-term criminal conduct." *H.J.*, 492 U.S. at 242. Congress enacted RICO as a modest departure from traditional federalism principles to wage a national "war against organized crime." *Turkette*, 452 U.S. at 586. Extending the statute to fleeting, unstructured alliances of petty criminals divorces it from this narrow rationale for slightly altering the state-federal law enforcement balance. It tacks too close to a national police power, *cf. United States v. Lopez*, 514 U.S. 549 (1995), federalizing "much ordinary criminal behavior, ranging from simple assault to murder, ... that typically is the subject of state ... prosecution." *Scheidler v. Nat'l Org. For Women, Inc.*, 547 U.S. 9, 20 (2006) ("*Scheidler III*"); *cf. Anza*, 547 U.S. at 472 (Thomas, J., *concurring and dissenting*) (RICO not intended to "remedy general state-law criminal violations"); *Sedima*, 473 U.S. at 503 (Marshall, J., joined by Brennan, Blackmun and Powell, JJ., *dissenting*) (broadly interpreting RICO's criminal provisions (continued...)

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In sum, an ascertainable structure requirement is harmonious with – if not implicit in or dictated by – this Court's interpretation of RICO's core elements in *Turkette*, *Reves*, *H.J.*, *Kushner*, *Scheidler I* and *Salinas*. Because it also aligns with the statutory text and framework, as indicated above and elaborated below, the Court should adopt the requirement as a formal holding.

II. RICO'S WORDS AND STRUCTURE – INTERPRETED UNDER CONVENTIONAL CONSTRUCTION CANONS AND IN THE BROADER CONTEXT OF OCCA AND VICAR – MANDATE AN ASCERTAINABLE STRUCTURE REQUIREMENT

Analyzing RICO's language and framework under standard canons of statutory construction –

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[23](...continued)
reverses presumption that states primarily responsible for enforcing state law) (citation and quotation omitted).

On the other hand, a continuing structure requirement respects Congress's delicate policy balance while curbing RICO's more extravagant civil applications, in which phantom enterprises abound. *See H.J.*, 492 U.S. at 255 (Scalia, J., joined by Kennedy and O'Connor, JJ., and Rehnquist, C.J., *concurring in judgment*) (lamenting RICO's "federalization of broad areas of state common law") (citation and internal quotes omitted); Alito Article at 12 (describing civil RICO suits "arising out of landlord-tenant and real estate disputes, employment grievances, and even divorce fights"); *cf. Bridge*, 128 S. Ct. at 2145.

independently, as part of the larger OCCA and in light of the corresponding VICAR law – verifies that they require a discernibly structured enterprise.

A. STRUCTURE IS APPARENT IN THE PERTINENT STATUTORY TITLES

To begin, structure is evident in RICO's considered statutory title: *Racketeer* Influenced and Corrupt *Organizations* Act. *See, e.g., United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804) (Marshall, C.J.) (title generally relevant in statutory construction); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (same); *Sedima*, 473 U.S. at 524 (Powell, J., *dissenting*) (referencing RICO's title in exploring its intended reach); Blakey & Gettings at 1025 n.91 (stressing title's importance in interpreting RICO); Blakey at 258 n.59 (title reflects RICO's full and "final scope"); *Bagaric*, 706 F.2d at 57 n.13 (relying on statutory title in construing RICO).

As previously explained, the word "organization" is synonymous with "structure." And according to Prof. Blakey, RICO's architect, "racket" and "racketeer" connote a "business" or its operation, naturally entailing a businesslike structure. *See* Blakey at 250 n.41 ("A business that obtains money through fraud or extortion"; "One engaged in an illegal business"; "the

operation of an illegal business as well as ... a legal [one]") (citations and internal quotes omitted).

Similarly, the word "Organized" in OCCA's title was "directed at criminal activity carried out by large organizations, described by Congress as hierarchical in structure and as having their own system of law and independent enforcement institutions." *Iannelli v. United States*, 420 U.S. 770, 794 (1975) (Douglas, J., joined by Stewart and Marshall, JJ., *dissenting*) (footnote omitted).

Thus, in their "normal usage,"[24] "ordinary meaning"[25] and "common understanding,"[26] RICO's and OCCA's titular words strongly suggest some kind of structure, businesslike or otherwise.

B. A STRUCTURED ENTERPRISE REQUIREMENT GIVES EFFECT TO ALL OF § 1962(c)'S TERMS AND RENDERS NONE SUPERFLUOUS

As discussed in our **Overview**, conflating an enterprise with its predicate crimes effectively

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[24] *See H.J.*, 492 U.S. at 238, 241.

[25] *Richards v. United States*, 369 U.S. 1, 9 (1962).

[26] *Reves*, 507 U.S. at 179.

"eliminate[s]"[27] the enterprise in illicit association cases, because "any pattern of racketeering virtually requires some association-in-fact for its commission," Vitter at 1427 (footnote and citations omitted). Accordingly, the minority view not only contravenes *Turkette*'s clear admonition – the enterprise "at all times remains a separate element which must be proved," 452 U.S. at 583 – but reduces the word to pure "surplusage." *Beck v. Prupis*, 529 U.S. 494, 506 (2000).

In so doing, the minority view upends the "longstanding canon" that shuns "meaningless" constructions, *id.*, and eschews "linguistic superfluity." *Scheidler III*, 547 U.S. at 21. *See, e.g., Chang*, 80 F.3d at 1298 ("every pattern of racketeering activity becomes an enterprise") (citation and internal quotes omitted). Conversely, a structure requirement faithfully applies the canon by giving the enterprise "effect" as a separate statutory element. *Scheidler III*, 547 U.S. at 21; *see, e.g., Bledsoe*, 674 F.2d at 663 (giving effect to all statutory words requires "association with an enterprise ... distinct from participation in the conduct of the enterprise through a pattern of racketeering").

C. A STRUCTURED ENTERPRISE REQUIREMENT CONFORMS WITH § 1961(4)'S SURROUNDING TEXT

"Statutory language must be read in context since a phrase gathers meaning from the words around

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[27] *Sedima*, 473 U.S. at 498.

it." *Genl. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 582 (2004) (citations, internal quotes and alterations omitted). Section 1961(4) defines an enterprise to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." As Judge Posner recently explained, the second clause – "juxtaposi[ng]" the phrase "associated in fact" with "although not a legal entity" – suggests that an associative enterprise "just means structured without the aid of legally defined structural forms such as the business corporation." *Limestone*, 520 F.3d at 804-05.[28] This conclusion is buttressed by the conjunction "although," which, in

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[28] The minority courts' main objection to a structure requirement, that "criminal enterprises 'may not observe the niceties of legitimate organizational structures,'" *Odom*, 486 F.3d at 551 (quoting *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001)), overlooks *Turkette*'s observation that enterprise organization may be "formal or informal," 452 U.S. at 583. Judge Posner's analysis, properly reflecting that observation, firmly refutes the objection. As many courts thus recognize, structure is not "inconsistent with the existence of enterprises that pursue entirely illicit goals," Second Lynch Article at 974 – or, for that matter, licit and illicit ones. *See, e.g., Lemm*, 680 F.2d at 1201 (evidence showed "ongoing structure" engaged in "legitimate purchases and repairs as well as acts of arson"); *Rogers*, 89 F.3d at 1337 (structure does not require proof that group "engages in some other legitimate activity"); *Torres*, 191 F.3d at 806 (continuity of *informal* enterprise and role differentiation can supply requisite structure).

context, implies something approaching or resembling, but not amounting to, a "legal entity." *See* American Heritage at 55 (defining "although" as "even though"); Webster at 63 ("even if").

Judge Posner's interpretation finds additional support in the word "union," which immediately precedes "group of individuals associated in fact" in the second clause. As used in § 1961(4), "union" means labor union[29] – a quintessentially structured entity. *See, e.g., Burdett*, 957 F.2d at 1379 (statute aimed at "labor unions"); Rakoff & Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 1.05[6] at 1-67 (2001 ed.) ("Labor unions are expressly included within the definition of an 'enterprise'"); Ninth Cir. PJI 8.129 (equating "union" with "commercial enterprise"); *id.*, Comment (equating "union" with, *inter alia*, "partnership" and "corporation") (citation and internal quotes omitted); CA 10 Cmt. (conjoining "unions and

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[29] Since labor unions were not considered legal entities at common law and their legal status was uncertain at RICO's passage, Congress seems to have included them in the second, informal entity clause in an excess of caution, to ensure their coverage. *See, e.g., Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 617 (6th Cir. 2004) (unions generally not recognized as permissible litigants or legal entities at common law) (citing *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510 (1962); *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 454 (1957)); *Bridge*, 128 S. Ct. at 2139 (Congress legislates against backdrop of common law presumptions); *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (holding unincorporated labor union not a citizen for purposes of diversity jurisdiction).

their benefit funds" and equating them with, *inter alia*, partnerships, corporations and government entities).

Indeed, reading "union" as a common noun rather than a proper one – that is, an "alliance or confederation of people,"[30] a "consolidated body or group"[31] or "a confederation or league of independent individuals"[32] – would make it redundant of the succeeding phrase "group of individuals," confounding the anti-nullification canon. *See Beck*, 529 at 506; *cf.* 18 U.S.C. § 1961(1)(C) (listing violations of 29 U.S.C. §§ 186, involving corrupt payments to "labor organizations," and 501(c), concerning "embezzlement from union funds," as RICO predicate acts).

Thus viewed, union ineluctably means a *structured* labor union, underscoring that the adjacent phrase "associated in fact" also signals some kind of structure. *See, e.g.,* 115 Cong. Rec. 5,874-75 (1969) (Sen. McClellan) ("Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate [labor] unions."); Pub. L. 91-452 § 1, 84 Stat. 922-23 (1970) (Congressional Statement of Findings and Purposes) ("Findings Statement") (organized crime

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[30] American Heritage at 1952.

[31] Webster at 2499.

[32] *Ibid.*

"infiltrate[s] and corrupt[s] "legitimate business and labor unions").[33]

Finally, as Judge Posner soundly concluded, the textual "inference" that an associational enterprise requires some structure – though not necessarily a legally defined one – "is reinforced by the fact that before 'any union or group of individuals associated in fact' ... appears a list of [formally structured] legal entities," *Limestone*, 520 F.3d at 805: specifically, partnerships, corporations, associations, etc. *Cf. Turkette*, 452 U.S. at 581-82.

D. THE COROLLARY VICAR STATUTE SHOWS THAT STRUCTURE IS INTRINSIC TO A RICO ENTERPRISE

Passed in 1984 to "complement" RICO,[34] 18 U.S.C. § 1959 punishes the commission of violent crimes for anything of pecuniary value from, or to enter, maintain or increase position in, "an enterprise engaged in racketeering activity." The "enterprise" definition is substantially "the same" as RICO's, *Rogers*, 89 F.3d at 1335 – including a "group of

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[33] Even as a common noun, "union" still evokes something structured. *See* Webster at 2499 ("a uniting (as of groups, factions, people) into a coherent and usu. harmonious whole").

[34] *See, e.g., United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999); *Rogers*, 89 F.3d at 1335.

individuals associated in fact" – and is meant to have the "same meaning," 3 Sand 52-72, and "scope." *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994) (citing legislative history) (internal quotes omitted). *See, e.g.,* Dept. of Justice U.S. Attorney's Manual, § 9-110.812(C) (1997) ("USAM") (definitions are "closely related"); *Rogers*, 89 F.3d at 1335 (drawing on RICO cases in construing § 1959 "enterprise"); 3 Sand at 52-72 ("all" RICO enterprise precedent "is applicable to section 1959") (footnote omitted).

By VICAR's plain terms, an enterprise is something into which one gains entry, and in which one holds, maintains and increases position. It is something that has interests, and is capable of paying outsiders – independent contractors, as it were – to promote them. *See, e.g., United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992); 3 Sand at 52-78. And it is something capable of enforcing internal "discipline," *id.* Inst. 52-41, and imposing obligations and responsibilities "as an integral aspect of membership," *Fiel*, 35 F.3d at 1004 (quoting legislative history) (internal quotation marks omitted).

What do these characteristics suggest if **not** a structured entity? A RICO enterprise should not be construed any differently. Even the government concedes that VICAR "incorporates RICO concepts and terms, namely 'enterprise' and 'racketeering activity,' and there is a need to maintain consistent applications and interpretations" of RICO's "elements." USAM § 9-110.802; *see also id.* § 9-110.815 (stressing VICAR's

"similarity to RICO"). Accordingly, the government says it will not prosecute § 1959 cases "**unless the enterprise has an ascertainable structure ... apart from the racketeering activity** and crimes of violence it is engaged in, and otherwise meets the standards for a RICO prosecution." *Id.* § 9-110.812(C) (emphasis supplied). This is compelling evidence for Boyle's position. *Cf. Scheidler III*, 547 U.S. at 21 (relying on subsequent Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(3), in parsing earlier Hobbs Act, 18 U.S.C. § 1951).

E. RICO AND OCCA SCRUPULOUSLY DISTINGUISH ENTERPRISE AND CONSPIRACY

RICO conspiracy and predicate conspiracy are "distinct offenses with entirely different objectives." *United States v. Pungitore*, 910 F.2d 1084, 1135 (3d Cir. 1990). As the Third Circuit explained:

> The object[] of a RICO conspiracy is to assist the enterprise's involvement in corrupt endeavors, whereas the object[] of [a] predicate conspiracy is confined to the commission of a particular substantive offense. Because of this distinction, a person may join a predicate conspiracy and agree to commit a substantive offense but not be a RICO conspirator and not commit a substantive RICO offense.

United States v. Irizarry, 341 F.3d 273, 293 n.7 (3d Cir. 2003) (citations, internal quotes and alterations omitted); *accord Salinas*, 522 U.S. at 477-78 (conspirator must "adopt" and "intend to further" goal of facilitating a "criminal endeavor").

As demonstrated in our **Overview**, the minority approach blurs "this distinction"[35] by merging an enterprise with its pattern of predicate crimes – conspiracy and substantive – imposing blanket RICO liability merely for committing or agreeing to commit racketeering acts. It thereby reduces RICO to a glorified proscription of multi-object conspiracies extending over time,[36] offering automatic sentence jumps in all § 371 cases, *cf. Santos*, 128 S. Ct. at 2026-27 (plurality opinion) – including Boyle's given his overarching bank burglary conspiracy conviction. *See supra* 20.

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[35] *Irizarry*, 341 F.3d at 293 n.7.

[36] *See, e.g.,* U.S.S.G. § 1B1.4; Second Lynch Article at 946 & n.123 ("a single conspiracy can include among its objects the commission of several crimes – either multiple violations of the same statute or violations of several statutes") (citing *Braverman v. United States*, 317 U.S. 49, 53 (1942)); *cf. Iannelli*, 420 U.S. at 796 (dissenting opinion) (enterprise invariably involves "repeated transactions").

This approach defies common sense, as it would "RICO-ize vast amounts of conspiracy law"[37] and Congress could have achieved the same result simply by amending § 371 to hike its penalties and/or strike its overt act requirement. *See, e.g.,* Second Lynch Article at 942 n.107 ("If penalties for certain offenses are insufficient, they should be raised."). But Congress consciously chose a different route, hunting bigger game than journeymen conspirators: coordinated, resourceful, relatively sophisticated *structures* and the greater threat they pose. *See, e.g.,* Vitter at 1427-30, 1443-44.

Fortifying that conclusion are RICO's and OCCA's statutory text and structure, which studiously distinguish an "enterprise," on the one hand, from a "conspiracy" and its counterparts on the other. *Compare, e.g.,* 18 U.S.C. § 1962(c) (prohibiting unlawful conduct of "enterprise") *with id.* § 1962(d) (prohibiting "conspir[acies]" to violate §§ 1962(a)-(c)) *and id.* § 1963(f) (forfeiture provisions addressing persons "acting in concert" with defendant) *and id.* § 3575(e)(3) (recidivist enhancements for prior felonies committed in furtherance of "conspiracy" defendant supervised) (repealed)[38] *and id.* § 1511(a)(1) (punishing "conspiracy"

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[37] Oral Argument Tr. in *Mohawk Inds., Inc. v. Williams*, No. 05-465, 2006 WL 1194498, at *45 (April 26, 2006) ("*Mohawk* Tr.") (Breyer, J.).

[38] This Court has acknowledged that § 3575 "may be useful (continued...)

to corrupt government officials to facilitate illegal gambling business).

Where, as here, Congress "includes particular language in one section of a statute but omits it in another," it generally acts "intentionally and purposely," and this Court "refrains from concluding" that "differing language in ... two subsections has the same meaning in each." *Russello*, 464 U.S. at 23 (citation and internal quotes omitted). In view of these bedrock presumptions, and given their disparate uses throughout RICO and OCCA, enterprise and conspiracy surely mean, and are, different things – despite the minority courts' blending them into one. *See Turkette*, 452 U.S. at 580 ("internal inconsistencies" are to be avoided in statutory construction) (citations omitted). Indeed, this Court has long appreciated Congress's "clear awareness of the distinct nature of a conspiracy" and its objects in OCCA, intending them as "independent curb[s]" in an integrated organized crime

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[38](...continued)
in interpreting other [OCCA] sections." *Cf. Sedima*, 473 U.S. at 496-97 n.14; *H.J.,* 492 U.S. at 239-40. In that light, § 3575(e)(3)'s use of conspiracy rather than enterprise is especially telling, as a model for that provision originally used the enterprise-like phrase "continuing illegal business" instead. *See* First Lynch Article at 671 n.48 (citations and internal quotes omitted). The switch corroborates that conspiracy and enterprise are distinct concepts. *Cf. Russello*, 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.") (citations omitted).

"strategy." *Iannelli*, 420 U.S. at 788-90 (citation and internal quotes omitted).

The minority position scuttles this "careful[]" dichotomy, *id.* at 789, by reducing a § 1962(c) enterprise to a "simple copy"[39] of a § 1962(d) conspiracy – already broader and "more comprehensive" than § 371, *Salinas*, 522 U.S. at 63-64 – rendering either provision nugatory. Again, that flouts both the anti-nullification canon and *Salinas*'s own reaffirmation that racketeering – here, conducting an associative enterprise illegally – and racketeering conspiracy are "two [separate] crimes" whose "fact[s]" may converge. 522 U.S. at 65-66 (juxtaposing "enterprise" with "conspiracy to further it"); *accord Iannelli*, 420 U.S. at 788 n.21 (juxtaposing "enterprise" with "conspiracy") (citing legislative history). And, if anything, the practical difficulty in "determining just where the enterprise ends and the conspiracy begins," *Salinas*, 522 U.S. at 65, makes a structure requirement even more imperative, so judges and juries can meaningfully distinguish them.

Without such a requirement, on the other hand, RICO would swallow if not negate 18 U.S.C. § 1955, OCCA's Title VIII. That provision imposes a five-year sentence on defendants who run illegal gambling businesses – those operating for over 30 days or

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[39] *Anza*, 547 U.S. at 486 (Breyer, J., *concurring and dissenting*).

grossing $2000 in any one day – involving five or more persons who "conduct, finance, manage, supervise, direct, or own" them. Section 1955 violations are designated RICO predicate acts. *See* 18 U.S.C. § 1961(1). Thus, absent a structured enterprise requirement, prosecutors could evade § 1955's five-or-more-managers threshold – and actually obtain a stiffer, 20-year sentence – simply by charging two months or even two lucrative days of group gambling as a § 1962(c) offense. All joint gambling infractions threatening any continuity would thereby become *per se* RICO violations, making § 1955 an utterly futile exercise. To avoid that anomaly, an associative RICO enterprise must have a perceptible structure at least approximating that of a § 1955 "illegal gambling business." *Cf.* Kiffel at 117-18 & nn.108-09 and authorities cited.[40]

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[40] Granted, Congress knows how to impose an express structure requirement when it wants to. *See, e.g.,* 21 U.S.C. § 848(c)(2)(A); 18 U.S.C. § 521; 18 U.S.C. § 1955(a)-(b); *cf.* 18 U.S.C. § 1952(b). But those enterprises or enterprise-like entities involve particular kinds of illegal activity – *viz.*, drugs (§ 848), drugs and violence (§ 521), gambling (§ 1955) – so Congress could define them narrowly and precisely. By contrast, RICO was designed to accommodate enterprises of every conceivable stripe – legal, illegal and otherwise, *see Turkette*, 452 U.S. 576 – so Congress had to paint more broadly. It does not follow, however, that such enterprises may be entirely without structure. As *Turkette* itself indicates, the shoe is on the other foot. *Cf. Russello*, 464 U.S. at 24-25 (rejecting proposed analogy to Continuing Criminal Enterprise (CCE) statute, though "passed by the same Congress in the same month" as RICO, because "Language in one statute

(continued...)

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In sum, a structured enterprise requirement is manifest in the titles, terms, context and framework of RICO, OCCA and VICAR, interpreted under cardinal construction canons. *See Scheidler I*, 510 U.S. at 260 (suggesting that appropriate "requirement[s]" may be "fairly implied" in RICO's and OCCA's "operative sections").

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[40](...continued)
usually sheds little light upon the meaning of different language in another ..., even when the two are enacted at or about the same time.").

III. AN ASCERTAINABLE STRUCTURE REQUIREMENT COMPORTS WITH RICO'S STATUTORY PURPOSE AND LEGISLATIVE HISTORY

As this Court[41] and the government[42] have repeatedly recognized, RICO was passed primarily, though not exclusively, to combat organized crime and its infiltration of business, labor unions and government – structured entities all. *See, e.g.,* Findings Statement (statute "seek[s] the eradication of organized crime in the United States"); 115 Cong. Rec. 5,872 (1969) (Sen. McClellan) (Mafia confederation

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[41] *See, e.g., H.J.*, 492 U.S. at 245 ("Organized crime was without a doubt Congress' major target"); *Russello*, 464 U.S. at 26 (legislative history "clearly demonstrates" that RICO intended to "provide new weapons of unprecedented scope for an assault upon organized crime"); *Turkette*, 452 U.S. at 591 ("major purpose" was to "address the infiltration of legitimate business by organized crime").

[42] *See, e.g., Reves*, 507 U.S. at 185 (government conceding that "RICO's major purpose was to attack the infiltration of organized crime and racketeering into legitimate organizations") (citation and internal quotes omitted); Govt. *Amicus* Br. Supporting Respondents in *Mohawk*, 2006 WL 680358, at *10 n.2 (March 16, 2006) (§ 1961(4)'s "express inclusion of associated-in-fact enterprises may reflect Congress's effort to ensure that organized-crime syndicates are treated as covered 'enterprises'"); *Mohawk* Tr. at *45 ("Congress added a specific reference to groups of individuals [because] they were thinking in terms of mob families or syndicates.... [T]hey wanted to make sure those were covered").

"epitomizes," if not "exhaust[s]," organized crime concept). Requiring some discernibly structured enterprise – if not the full-blown coordination, integration and multi-dimensionality that commanded Congress's attention[43] – thus advances the statutory goal without restricting its intended scope. *See, e.g.,* 115 Cong. Rec. 9,567 (1969) (Sen. McClellan) (calling for a "frontal assault" on "the bastions of organized crime"); 116 Cong. Rec. 35,309 (1970) (Rep. Minshall) ("expertly organized, highly sophisticated criminal syndicates have bled our citizens").

While admittedly not so constrained,[44] RICO was "plainly enacted ... to address the problem of organized crime." *Anza*, 547 U.S. at 471 (Thomas, J., *dissenting*); *see also id.* at 473-74 (Congress, Court and Presidential Commission agree that RICO chiefly concerned with "protect[ing] businesses against competitive injury from organized crime"). The statute touches others only "incidental[ly,]" 116 Cong. Rec. 18,914 (1970) (Sen. McClellan), or "inadvertently,"[45] to ensure coverage of organized crime in all its variety and quell constitutional concerns about creating a status crime, *see Sedima,* 473 U.S. at 525 (Powell, J., *dissenting*)

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[43] *See* Alito Article at 3 ("great bulk" of congressional debate "focused narrowly on the Mafia and, specifically, mafia infiltration of legitimate business").

[44] *See, e.g., H.J.*, 492 U.S. at 248.

[45] *Ibid.* at 479.

(citing 116 Cong. Rec. 35,343-44 (1970) (Rep. Celler); *id.* at 35,344 (Rep. Poff)).

In fact, the "enterprise" element was intended as a "critical limitation," *Reves*, 507 U.S. at 183, to focus RICO specifically on "traditional organized crime and comparable ongoing criminal activities carried out in a **structured**, organized environment," *Sedima*, 473 U.S. at 526 (Powell, J., *dissenting*) (citation omitted) (emphasis supplied). As Sen. McClellan himself flatly put it, RICO rests on the "judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest." 115 Cong. Rec. 9,568 (1969); *accord* 116 Cong. Rec. 18,940 (1970) (Sen. McClellan) (no RICO liability unless defendant uses "pattern to obtain or operate an interest in an interstate business").

In particular, Congress aimed the Act at coordinated criminal penetration and corrupt operation of structured "organizations," 115 Cong. Rec. 9,567 (1969) (Sen. McClellan), like businesses and labor unions. *See, e.g.,* 115 Cong. Rec. 6,992-93 (1969) (Sen. Hruska) (legislation "seeks to strengthen the defense of legitimate business against takeover by organized crime"); 116 Cong. Rec. 591 (1970) (Sen. McClellan)

("Labor unions are infiltrated, and then labor peace is sold to businesses.").[46]

That these classic structured entities – criminal syndicates,[47] businesses, labor unions and government agencies[48] – dominated congressional debate suggests a solid expectation that all RICO enterprises, § 1962(c) associational enterprises and otherwise, would have at least some degree of structure. This is particularly true

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[46] Two stray snippets in the legislative history state that "enterprise" was defined to include "associations in fact[] as well as legally recognized associative entities. Thus, infiltration of any associative group by any individual or group capable of holding a property interest can be reached." S. Rep. No. 91-617, at 158 (1969); H.R. Rep. No. 91-1549, at 56 (1970) (same). The phrase "any associative group" plainly refers to that which is infiltrated, not to an enterprise that is operated criminally in the first instance – the paradigmatic association-in-fact and the kind alleged here. And, far from suggesting that such illicit enterprises need no structure, the expectation that they can hold "property interest[s]" implies just the opposite.

[47] *See, e.g.,* 115 Cong. Rec. 5,872 (1969) (Sen. McClellan) (referencing mafia families' "hierarchical **structure**") (emphasis supplied); *id.* (stressing "unique strength of La Cosa Nostra's familylike **structure**") (emphasis supplied); *id.* at 5,876-77 (Sen. McClellan) (describing "inner working[s]" of organized crime's "'family' **structure**") (emphasis supplied); 116 Cong. Rec. 585-86 (1970) (Sen. McClellan) (discussing organized crime's "internal **structure**") (emphasis supplied).

[48] *See, e.g.,* Findings Statement (organized crime has "subvert[ed] and corrupt[ed] our democratic processes").

in the absence of any significant legislative history to the contrary.

Indeed, operational structure is the linchpin that distinguishes coordinated criminality from average conspiracy, fueling the potent social threat that spurred RICO's passage. 115 Cong. Rec. 5,876 (1969) (Sen. McClellan) (Mafia is "the 'cement'" for organized crime's "national **structure**") (emphasis supplied); 116 Cong. Rec. 601 (1970) (Sen. Hruska) (organized crime "involves thousands of criminals, working within **structures** as complex as ... any large corporation") (emphasis supplied). After all, it is structure that heightens these enterprises' danger, helping leaders escape justice and sustaining the organization when they are incapacitated. *See, e.g.,* 113 Cong. Rec. 17,950 (1967) (Rep. McClory) ("business racketeers" and "criminal cartels" employ "staffs of attorneys, accountants, and business consultants" to thwart prosecution); 116 Cong. Rec. 586 (1970) (Sen. McClellan) (Mafia's "leadership structure" fosters acquittals and dismissals); Cressey, *The Functions & **Structure** of Criminal **Syndicates**, Task Force Report: the President's Comm'n on Law Enforcement & Admin. of Justice,* 25, 57 (1967) ("directors of **criminal business organizations**" remain "immune from arrest, prosecution, and imprisonment") (emphasis supplied)[49]; 116 Cong. Rec. 607 (1970) (Sen. Byrd) (convictions

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[49] As Prof. Blakey himself has acknowledged, Prof. Cressey's "Structure" paper was instrumental in developing the statute's key "enterprise criminality" concept. *See* Blakey at 253 n.46.

simply remove syndicate leaders without "demolish[ing] the **structure** of the[ir] surviving organizations") (emphasis supplied).

For all these reasons, an ascertainable structure requirement squares with RICO's legislative history while maintaining its expansive reach.[50]

IV. A STRUCTURE REQUIREMENT MESHES WITH COMMON RICO PRACTICE AND WILL NOT HINDER THE STATUTE'S ENFORCEMENT

By redefining many diffuse offenses as a single crime through the enterprise vehicle, RICO hands the government a wealth of evidentiary and procedural advantages; implicit in each – and in other essentials of daily RICO practice – is a structured enterprise.

First, RICO's "unit of prosecution" for double jeopardy purposes is the pattern of racketeering *plus* the enterprise, *see, e.g., United States v. Russotti*, 717 F.2d 27, 32-33 (2d Cir. 1983), highlighting the enterprise's importance as a separate structural element. Otherwise (*i.e.*, were enterprise and pattern

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[50] Congress reiterated RICO's structural focus as recently as 1996, adding immigration-related predicate acts to target "**organized** smuggling gangs." 139 Cong. Rec. 9,923 (1993) (Sen. Simpson) (emphasis supplied).

functionally synonymous), a defendant could not identify the enterprise's basic parameters, and the government could repeatedly prosecute him for conducting the same supposed enterprise without his even knowing it – much less eliciting a jeopardy objection. That, in turn, would vitiate both jeopardy protection generally and the pattern plus enterprise test specifically, rendering them purely illusory.

Second, the government routinely introduces, and courts regularly approve, expert testimony concerning the "operation [and] **structure**" of the alleged enterprise, *United States v. Locascio*, 6 F.3d 924, 936-37 (2d Cir. 1993) (emphasis supplied). This is a tacit recognition that structure is an enterprise staple. *See, e.g., United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988) (such testimony "assist[s]" the jury). Otherwise the testimony would be irrelevant and inadmissible, as it raises thorny hearsay, confrontation and bolstering issues. *See Mejia*, 2008 WL 4459289, at *6-*17.

Third, to establish "the history, **structure** and internal discipline of the [alleged] enterprise," *United States v. Eufrasio*, 935 F.2d 553, 573 (3d Cir. 1991) (emphasis supplied), the government is typically allowed to present evidence of uncharged crimes, even when they are "unsavory" and relate to individuals other than the defendant. *Johnson*, 440 F.3d at 840-41. This so-called "enterprise proof," often severely prejudicial, skirts the strictures of Fed. R. Evid. 404(b). *See Old Chief v. United States*, 519 U.S. 172, 180-82

(1997). Boyle's case is illustrative, as the government offered "uncharged crimes and other acts ... as direct proof of the **structure** and organization of the [putative] racketeering enterprise." Govt. *in limine* motion, Feb. 15, 2005, at 1 (emphasis supplied). If there is no structured enterprise requirement, why should juries be permitted to consider murders and other violent crimes[51] by non-defendants that would otherwise be excluded under Rule 404(b)? The very notion of "enterprise proof" thus assumes that structure is vital to a RICO enterprise. Indeed, proving that structure is the ostensible point of the exercise, as juries are frequently told in limiting instructions, *cf. Mejia*, 2008 WL 4459289, at *9 (collecting cases).

Fourth, courts and juries infer the existence of other RICO elements from evidence of the enterprise, reaffirming that the enterprise is separate and distinct. Both the continuity (*see supra* 35-36) and the relatedness needed to "show a RICO pattern may be proven through the nature of the RICO enterprise." *See, e.g., United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) (*en banc*). Similarly, the requisite "connection" between pattern and enterprise may be found where the defendant's "position" in the enterprise "facilitate[s]" or enables the predicate acts' commission. *See, e.g.,* 3 Sand Inst. 52-25. These propositions make no sense without an enterprise transcending the

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[51] To be clear, there was no evidence of that nature in this case.

pattern; structure ensures one. Conversely, if pattern and nexus may be inferred from the enterprise, but the enterprise is nothing more than the pattern, settled authority becomes unintelligible. *See supra* 35-36.

Fifth, a RICO charge "provides substantial leeway to prosecutors," *Eufrasio*, 935 F.2d at 567, "loosening the statutory requirements for what constitutes joint criminal activity" and "limit[ing] the force" of ordinary joinder rules. *United States v. Castellano*, 610 F.Supp. 1359, 1396 (S.D.N.Y. 1985). The mere allegation of a common RICO enterprise allows joinder of otherwise unrelated crimes, *Eufrasio*, 935 F.2d at 567, defendants, *United States v. Krout*, 66 F.3d 1420, 1429 (5th Cir. 1995), and even "agreements" that would otherwise constitute "multiple [separate] conspiracies," *United States v. Maloney*, 71 F.3d 645, 664 (7th Cir. 1995). *A fortiori*, an enterprise must be something different and larger – something more tangible and structured – than a mere aggregation of those crimes, defendants and conspiracies. Through the enterprise "umbrella," RICO "ties together" highly "diversified acts" in a single, "multifaceted" prosecution. *Eufrasio*, 935 F.2d at 566; *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978).

Sixth, and finally, RICO allows the government to revive otherwise stale crimes – often decades old and long since time-barred – by charging them as predicate acts along with just one other recent act. *See, e.g., United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir. 1994). A structured enterprise is the engine that drives

this circumvention, if not indefinite extension, of the limitations period. *Cf., e.g.,* Second Lynch Article at 929, 940, 979.

In sum, the government cannot have it both ways, reaping enormous tactical benefits from enterprise structure – powerful expert testimony; damaging "enterprise proof" exceeding Rule 404(b); prejudicial joinder of defendants, charges and conspiracies; and a functionally extended statute of limitations – while denying the existence of any structure requirement. Enterprise is the hub of the government's RICO litigation strategy, and structure the conceptual glue that binds it together.[52]

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[52] Since the government is already proving enterprise structure in the bulk of cases, a structure requirement will not make RICO charges harder to prosecute – an invalid objection in any event. *See Santos*, 128 S. Ct. at 2028-29 (plurality opinion); *Richardson v. United States*, 526 U.S. 813, 823 (1999); *cf. supra* n.11 (noting prevalence of structure requirement and jury instructions without impairment of RICO's administration). If the government cannot clear this "very low hurdle," *Korando*, 29 F.3d at 1118 – that is, if it cannot establish a *bona fide* enterprise – then RICO should not be invoked because the predicate acts are independently punishable as state and/or federal crimes. *See, e.g., Burdett*, 957 F.2d at 1379 (requiring "some" structure but not "much"); *Turkette*, 452 U.S. at 578-80 (professional-type organization committing distinct crimes); *Riccobene*, 709 F.2d at 223-24 (overseeing, clearinghouse and coordination function shows "separate existence") (footnote omitted); *Tillett*, 763 F.2d at 631-32 (recurring *modus operandi;* existence between predicate acts); *Johnson*, 440 F.3d at 840 (division of labor); *Limestone*, 520 F.3d

(continued...)

V. PRINCIPLES OF LENITY, CONSTITUTIONAL AVOIDANCE AND CONSTITUTIONAL DOUBT WARRANT AN ASCERTAINABLE STRUCTURE REQUIREMENT

In recent years, this Court has reemphasized a defendant's fundamental right, under the Constitution's Fifth and Sixth Amendments, to have every essential element of a criminal offense determined by a jury beyond a reasonable doubt. *See, e.g., Booker*, 543 U.S. at 230; *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-78 (2000). By its terms, 18 U.S.C. § 1962(c) makes it "unlawful" to conduct an enterprise through a pattern of racketeering activity, a felony punishable by up to 20 years in prison. *See* 18 U.S.C. § 1963(a). As such, the statute indisputably sets forth a "criminal prohibition[,]" *Bridge*, 128 S. Ct. at 2137, of which an enterprise is a "predominant," *Salinas*, 522 U.S. at 62 (citation omitted), and "essen[tial]" element. *Anza*, 547 U.S. at 457 (citation and internal quotes

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[52](...continued)
at 804 ("personnel having differentiated functions"); *see also supra* 20 (observing that Boyle was already convicted and punished for underlying bank burglary and bank burglary conspiracy offenses). Alternatively, if the government cannot prove the separately structured § 1962(c) enterprise it has charged, it can either replead the pattern and a different enterprise without jeopardy bar (*see supra* 58-59) or simply allege a § 1962(d) violation, avoiding pattern/enterprise distinctness problems altogether. *See Salinas,* 522 U.S. at 65-66.

omitted); *see Sedima*, 473 U.S. at 489 (§ 1962 "renders certain conduct 'unlawful,'" while § 1963 imposes criminal "consequences" for its violation).

A construction that fuses enterprise and pattern, effectively erasing enterprise from the statute, therefore implicates fundamental rights and raises major constitutional concerns. *See, e.g., Salinas*, 522 U.S. at 475 (statutes should be "construed to avoid constitutional questions") (citation and internal quotes omitted); *Clark v. Martinez*, 543 U.S. 371, 379 (2005) ("statutes should be interpreted to avoid constitutional doubts"). It substantially reduces the burden of proof, practically eliminating an entire element, and thus relieves the government's Fifth Amendment obligation to establish each essential element beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). And, insofar as it permits juries to infer an enterprise even if the pattern evidence does not suggest any structure,[53] the minority view effectively removes the enterprise element from the jury's consideration, offending the Sixth Amendment's jury trial guarantee. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 510 (1995).

Similarly, to the extent that (A) "associated in fact" is a cryptic locution that has riven the circuits; (B) such an enterprise is deemed materially identical to, or

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[53] *Cf.* JA 111-12 ("Common sense suggests that the existence of an enterprise is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.").

wholly inferable from, its pattern of predicate acts; and (C) the pattern concept itself is certifiably vague,[54] the minority approach raises significant notice problems under the Fifth Amendment's due process clause. *See, e.g., United States v. Williams*, 128 S. Ct. 1830, 1845-46 (2008) (criminal statute must fairly inform reasonable people of what it purports to proscribe, precisely enough to prevent arbitrary enforcement); *H.J.*, 492 U.S. at 255-56 (opinion concurring in judgment) ("since it has criminal applications," RICO must "possess the degree of certainty required for criminal laws" even in its "civil applications").

To compound the vagueness problem, patterns of racketeering are individual rather than collective – and different criminal confederates often commit markedly different crimes – so it is unclear whose pattern(s) would undergird an enterprise inference. *See, e.g.,* 3 Sand Inst. 52-23 (government must prove beyond reasonable doubt "that the **defendant** engaged in a pattern of racketeering activity") (emphasis supplied); Fifth Cir. PJI 2.78 (enterprise must be "separate and apart from the pattern of racketeering activity in which the **defendant** allegedly engaged") (emphasis supplied); *Rogers*, 89 F.3d at 1337 ("a **single individual** may engage in a pattern of racketeering activity") (emphasis supplied). Thus, to suggest that an enterprise may be completely defined by **its** pattern of racketeering activity is, in a very real sense, a nonsequitur.

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[54] *See supra* n.22.

Finally, to make matters worse, the pattern may sometimes reduce to a bare replica of the otherwise empty enterprise element (*see supra* 35-36, 60-61), draining the minority approach of meaning in those instances.

To avoid these doubtful constructions and the serious constitutional questions they would stir, lenity requires an enterprise structure transcending – though provable in some cases from – that attending its participants' predicate acts. *See, e.g., Santos*, 128 S. Ct. at 2025 (plurality opinion) (rule of lenity breaks statutory ties in favor of defendants subjected to "ambiguous criminal laws"); *Reves*, 507 U.S. at 184 n.8 ("lenity would also favor the narrower operation and management test") (*dictum*); *Richardson*, 526 U.S. at 819-20 (applying doctrine of constitutional doubt to require jury unanimity as to predicate violations forming CCE "series"); *Jones v. United States*, 526 U.S. 227, 239-44 (2000) (applying constitutional doubt doctrine to hold penalty-enhancing provisions of the federal carjacking statute, 18 U.S.C. § 2119, offense elements rather than sentencing factors); *Jones v. United States*, 529 U.S. 848, 857-58 (2000) (applying constitutional doubt and lenity doctrines to hold owner-occupied residence beyond federal arson statute, 18 U.S.C. § 844, avoiding potential Commerce Clause problems).

RICO's liberal construction clause, providing that the statute "shall be liberally construed to effectuate its

remedial purposes,"[55] does not alter this conclusion. This would not be the first time the Court rejected an unbridled view of RICO over liberal construction objection. To the contrary, it did just that in refining the statute's other key elements – participation and pattern – in *Reves* (operation and management) and *H.J.* (relation and continuity). *See, e.g., Reves*, 507 U.S. at 186-87, 189 (Souter, J., joined by White, J., *dissenting*) (protesting that operation and management test "limit[s]" and "restrict[s]" RICO, contrary to liberal construction clause); *cf. Anza*, 547 U.S. at 463 (Thomas, J., *concurring and dissenting*) (majority opinion "limits" civil RICO "contrary to" Congress's "broad language"). *Reves* is especially striking in this regard, reading "participate" judiciously despite noting that *Russello* had called it a "term of breadth." 507 U.S. at 178 (quoting *Russello*, 464 U.S. at 21-22) (internal quotation marks and alterations omitted). That is precisely how *Russello* described "enterprise" in the very same passage.

What is more, Congress's Findings Statement contrasts RICO's "remedies" with its "penal prohibitions," declaring that the Act seeks to eradicate organized crime by "establishing new penal prohibitions" **and** providing "new remedies." This distinction suggests that the liberal construction clause means what it says: **only** the Act's "remedial" provisions,

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[55] Pub. L. 91-452 § 904(a), 84 Stat. 947, *see* note following 18 U.S.C. § 1961.

and **not** its criminal proscriptions, should be construed liberally. *Sedima* so implied, stating in *dicta* that the "strict-and-liberal construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c). Indeed, if Congress' liberal construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." 473 U.S. at 491 n.10 (citation omitted).

At least in criminal cases, then, the liberal construction clause bows to the aged canon construing penal laws strictly in defendants' favor. Any legislative effort to override that canon infringes due process, impugns the separation-of-powers and bears no weight. *See, e.g.,* Tarlow, "RICO Revisited," 17 Ga. L. Rev. 291, 309 & n.67 (1983); *United States v. Dunn*, 442 U.S. 100, 112 (1979); *United States v. Bass*, 404 U.S. 336, 348-49 (1971).

Beyond all that, this Court has underlined that the liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183-84. And as demonstrated *supra* n.23 and **POINT III**, "it is clear that Congress did not intend to extend RICO liability" to unstructured pockets of petty criminals. *Id.* at 184. If anything, the minority approach thus defeats, not serves, the statute's remedial purposes.

Last, any claim that RICO is purely remedial because the behavior it punishes is already criminal,

see, e.g., Blakey at 266-67 & n.89, is fanciful. As *Sedima* teaches, a defendant need not be convicted of **any** prior crime to violate RICO. Instead, § 1961 speaks of conduct "chargeable" or "indictable" under state or federal law, words connoting, at most, an *ex parte* finding of probable cause rather than an adjudication of guilt beyond a reasonable doubt. And as the statutory language plainly indicates, RICO's crux is not just committing predicate acts, but doing so "**in connection with the conduct of an *enterprise***." *Anza*, 547 U.S. at 457 (2006) (citation and internal quotes omitted) (emphasis supplied). Fairly read, then, § 1962(c) unequivocally creates a new federal crime.

At any rate, *Apprendi* and its progeny belie the remedy tag. Abolishing any distinction between offense elements and sentencing factors, they direct that every essential element – including enterprise – be charged in the indictment and proved to a jury beyond a reasonable doubt. Those constitutional imperatives, like the strict construction canon, surely trump a statutory liberal construction decree. And even if remedial in purpose, RICO's 20-year sentences and debilitating criminal forfeitures are overwhelmingly punitive in form and effect. *See Hudson v. United States*, 522 U.S. 93 (1997).

For all these reasons, the liberal construction clause is unavailing and this Court's time-honored interpretive guides – the tenets of lenity, constitutional avoidance and constitutional doubt – merit an ascertainable structure requirement.

VI. BOYLE'S CONVICTION SHOULD BE REVERSED

The evidence at trial was legally insufficient to establish the existence of an enterprise with an ascertainable structure. As discussed in our **Statement of the Case**, the supposed Boyle Crew was a band of "free floaters" with "no organization at all" in which "[n]obody had any type of standing." JA 45. The purported participants did not give the enterprise "a name," *United States v. White*, 116 F.3d 903, 924 (D.C. Cir. 1997), or "self-identif[y] as ... members," *Nascimento*, 491 F.3d at 33. JA 59, 86. There was no evidence of a "coherent racketeering entity," *Calcasieu*, 943 F.2d at 1462, that "existed in the intervals" between predicate acts, *Tillett*, 763 F.2d at 632, "independent of the[ ] individual crimes." *Richardson*, 167 F.3d at 625.

The government urged below that an enterprise was established because the alleged members played particular roles, used tools and communication devices, and divided proceeds. But the roles were not distinct; the participants and what they did – "who would be a lookout or who might go into the bank or who might be on the box" – varied from job to job. JA 91-92; *cf. Lemm*, 680 F.2d at 1999-2000 (specific individuals serving as property finder for arsons, insurance adjuster, real estate financier). The conspirators were not especially "well-equipped" or "sophisticated," *Torres*, 191 F.3d at 807, using only basic tools from "Radio Shack," JA 66, for the burglaries themselves, not

to make the criminal activity safer, more profitable or more widespread. *Cf. Tillett*, 763 F.2d at 632 (racketeers bought a smuggling boat). There was no evidence that the putative enterprise had any "financial backing," *Kragness*, 830 F.2d at 857, pooled proceeds or reinvested them to purchase equipment for additional crimes, *Chang*, 80 F.3d at 1300.

Because the enterprise proof was legally insufficient, the RICO counts must be dismissed, *cf. United States v. Kozminski*, 487 U.S. 931, 953 (1988), and the remaining convictions reversed for spillover prejudice. *United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996). Alternatively, Boyle is entitled to a new RICO trial due to the District Court's harmfully erroneous enterprise instruction. *United States v. Hassan*, 542 F.3d 968, 987 (2d Cir. 2008). At a minimum, the case should be remanded to the Second Circuit for consideration of these issues in the first instance under the applicable ascertainable structure test. *See, e.g., Richardson*, 526 U.S. at 824.

CONCLUSION

Boyle's conviction should be reversed.

Respectfully submitted,

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